

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

LESTER DARRYL MILTON,

Defendant-Appellant.

UNPUBLISHED

January 9, 2007

No. 262111

Oakland Circuit Court

LC No. 2004-197641-FC

Before: Owens, P.J., and White and Hoekstra, JJ.

PER CURIAM.

Defendant appeals as of right from his convictions of two counts of first-degree premeditated murder, MCL 750.316(1)(a), following a jury trial. Defendant was sentenced to concurrent terms of life imprisonment without parole for each conviction. We affirm.

In 1999, defendant confessed to murdering Thomas and Alice Tye in Oakland County. The confessions were made to individuals associated with the Detroit Police Department Violent Crime Task Force. Sometime prior to testifying before a federal grand jury in 2001, in exchange for pleading guilty to second-degree murder and a felony-firearm charge in state court concerning a separate murder that occurred in Wayne County, the United States Attorney's Office for the Eastern District of Michigan and the Wayne County Prosecutor granted defendant use immunity in exchange for his testimony that day and further continued cooperation with law enforcement. A written plea agreement is part of the record. In 2004, on two separate occasions, defendant was interviewed regarding the instant Oakland County murders by Oakland County law enforcement officers, and truthfully answered that he had committed the murders. The Oakland County prosecutor's office later charged defendant with two counts of first-degree murder for the killings that occurred in Oakland County. Prior to trial, defendant moved to dismiss the charges, and suppress his confessions made in 1999, and in 2004, and the information that was discovered as a result of those statements, asserting the prosecution and the use of the statements and derivative information violated the immunity agreement. The trial court denied defendant's motion, and he was later convicted as charged.

Defendant argues that his Fifth Amendment privilege against self-incrimination, US Const, Am V, and his constitutional right to due process, US Const, Am XIV, were violated by the Oakland County Prosecutor's Office pursuing these charges and using his statements. Questions of constitutional law are reviewed de novo. *People v Herron*, 464 Mich 593, 599; 628 NW2d 528 (2001).

Because the record provides no support for defendant's assertion that his 1999 statements were given pursuant to the later plea agreement or a promise of immunity or leniency, we find no error in the court's denial of defendant's motion to suppress the 1999 statements. Because the 1999 statements provided overwhelming evidence of defendant's guilt, we need not address the argument that the 2004 statements were compelled because mandated by the plea agreement. The admission of the 2004 statements was harmless in light of the 1999 statements. Further, defendant's assertion that the secrecy of the federal grand jury was violated ignores that the disclosures were permitted pursuant to a federal district court order.

Defendant also argues that the trial court abused its discretion under MRE 403 when it admitted autopsy photographs of the victims. We disagree. A trial court's decision to admit evidence is reviewed for an abuse of discretion. *People v Watson*, 245 Mich App 572, 575; 629 NW2d 411 (2001). In relevant part, MRE 403 provides that "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice"

Photographs are not excludable simply because a witness can orally testify about the information contained in the photographs. Photographs may also be used to corroborate a witness' testimony. Gruesomeness alone need not cause exclusion. The proper inquiry [under MRE 403] is always whether the probative value of the photographs is substantially outweighed by unfair prejudice. [*People v Mills*, 450 Mich 61, 76; 537 NW2d 909, mod on other grounds 450 Mich 1212 (1995) (internal citations omitted).]

Here, the trial court did not abuse its discretion in admitting the photographs. The trial court reasoned that the photographs would supplement two models that were used to demonstrate where the gunshots entered the victims. Further, the photographs substantiated defendant's statement to law enforcement officers that he shot the victims from the rear and then moved to the driver's side and fired more rounds. While the photographs were gruesome, they were not overly prejudicial in light of the testimony. Additionally, we are satisfied that their admission did not affect the outcome of the trial.

Defendant next argues that reversal is required because the trial court abused its discretion when it allowed the assistant prosecutor to play a videotaped interview of defendant to the jury, rather than read a transcript of the interview, where the tape revealed that defendant was in custody. We disagree. Unless a trial court specifically rules otherwise, references to a defendant's prior incarceration are generally inadmissible. *People v Spencer*, 130 Mich App 527, 537; 343 NW2d 607 (1983). Jurors are presumed to follow the trial court's instructions. *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). The trial court protected against any undue prejudice when it instructed the jury that although evidence was introduced that indicated that defendant had committed a crime other than the crimes charged, that evidence could only be considered to determine whether defendant killed the victims. Further, although the tape was compelling evidence of guilt, the 1999 statement similarly provided such evidence, and we are satisfied that defendant's conviction was not dependant on the videotape.

Defendant next argues that he was denied a fair trial because of certain acts of alleged prosecutorial misconduct. We disagree. An unpreserved error¹ may be considered on appeal if the alleged error was plain error and affected the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). The test of prosecutorial misconduct is whether the defendant received a fair and impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "A defendant's right to a fair trial may be violated when the prosecutor interjects issues broader than the guilt or innocence of the accused." *People v Rice (On Remand)*, 235 Mich App 429, 438; 597 NW2d 843 (1999). "The propriety of a prosecutor's remarks depends on all the facts of the case." *People v Rodriguez*, 251 Mich App 10, 30; 650 NW2d 96 (2002). Appellate review of improper prosecutorial remarks is generally precluded absent an objection because the trial court is deprived of its opportunity to cure the error. *People v Stanaway*, 446 Mich 643, 687; 521 NW2d 557 (1994). But an exception exists where a failure to consider the error would result in a miscarriage of justice or if a curative instruction could not have eliminated the prejudicial effect. *Id.*

Defendant first argues that the prosecutor made an improper civic-duty argument when, after referring to defendant's telephone conversation with his mother about the police in which he told his mother that "[t]hey know[,]" she commented, "Well now, ladies and gentlemen, you know. And it's your responsibility to do something about it." We conclude that no plain error occurred. While prosecutors are generally afforded great latitude regarding their comments, prosecutors should not resort to civic duty arguments. *People v Ackerman*, 257 Mich App 434, 452; 669 NW2d 818 (2003). Such comments are reviewed in context to determine whether they constitute error requiring reversal. *Id.* Here, when read in context, the assistant prosecutor informed the jury that in light of the overwhelming evidence against defendant, it was the jury's responsibility to find defendant guilty. This comment was not plainly erroneous because the prosecutor properly argued for conviction based on the evidence and not based on the fears or prejudices of the jury. See *People v Matuszak*, 263 Mich App 42, 56; 687 NW2d 342 (2004) (no error found where the prosecutor asked the jury to hold the defendant accountable because the facts established guilt beyond a reasonable doubt). Thus, when viewed in context, the challenged statement was not plainly improper.

Defendant next alleges that the prosecutor violated his Fifth Amendment privilege against self-incrimination by improperly commenting on defendant's decision not to testify. Assuming plain error, the error did not affect defendant's substantial rights. The trial court later instructed the jury that it could not consider defendant's decision not to testify as evidence of guilt given his right not to testify. This instruction was sufficient to cure any prejudice. Further, any prejudicial effect of the prosecutor's comments could have been cured by a

¹ Concerning one complained of instance, the assistant prosecutor stated, "[D]efense counsel didn't stand up here and say Defendant didn't do it, he said Defendant would make a bad witness." Defense counsel objected, claiming that he said no such thing and noting that defendant did not testify. This alleged error is unpreserved because a party must object at trial on the same ground as argued on appeal to preserve an issue. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001).

contemporaneous curative instruction. *Stanaway, supra* at 687. Thus, assuming plain error, defendant was not denied a fair trial.

Defendant finally argues that the comment improperly shifted the burden to defendant. Assuming plain error, the comment did not deny defendant a fair trial. A prosecutor may not attempt to shift the burden of proof or comment on a defendant's failure to present evidence as substantive evidence of guilt. *People v Reid*, 233 Mich App 457, 477-478; 592 NW2d 767 (1999). Additionally, a prosecutor may not imply that a defendant must present a reasonable explanation or must prove something. *People v Guenther*, 188 Mich App 174, 180; 469 NW2d 59 (1991). Again, the trial court's later instruction was sufficient to cure any prejudice. See *Graves, supra* at 486. Moreover, any prejudicial effect of the prosecutor's comments could have further been cured by a contemporaneous curative instruction. *Stanaway, supra* at 687.

Affirmed.

/s/ Donald S. Owens
/s/ Helene N. White
/s/ Joel P. Hoekstra